FILE COPY

Supreme Court, U. S.
FILED
AUG 16 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6060

ANTHONY LOUIS TACON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPRME COURT
OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

PETITION NOT PRINTED
RESPONSE NOT PRINTED

ROBERT J. HIRSH, ESQ.
509 Transamerica Building
Tucson, Arizona 85701

• THIEL PRESS •

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	4
SUMMARY OF ARGUMENTS	9
ARGUMENT:	
I. A Felony Defendant Cannot Be Tried Completely In Absentia	11
II. A Felony Defendant Cannot Be Held to Have Voluntarily Waived His Right To Be Present at His Trial Without a Hearing to Determine the Issue of Voluntariness and an Express Finding by the Trial Court on that Issue	17
III. A Felony defendant cannot be deprived of His Right To Be Present at the Trial of His Case Because He Is Too Impoverished to Afford Travel Expenses to the Site of His Trial	20
IV. The State of Arizona Did Not Establish a Knowing and Intelligent Waiver of Petitioner's Right To Be Present at His Trial in This Case	
CONCLUSION	22

TABLE OF CITATIONS

Cases:

Appleyard v. Massachusetts, 203 U.S. 222 (1906) 16

Biddinger v. Commissioner of Police, 245 U.S. 128 (1917) 16, 17

Boddie v. Connecticut, 401 U.S. 371 (1971) 21

Boykin v. Alabama, 394 U.S. 238 (1969) 19, 22

Carnley v. Cochran, 369 U.S. 506 (1962) 19

Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968) 19

Diaz v. United States, 233 U.S. 442 (1912) 12, 16

Douglas v. California, 372 U.S. 353 (1963) 21

Dowdell v. United States, 221 U.S. 325 (1911) 16

Dusky v. United States, 362 U.S. 402 (1960) 15

Fuentes v. Shevin, 40 U.S.L.W. 4692 (U.S. June 12, 1972) 19

Gideon v. Wainwright, 372 U.S. 335 (1963) 21

Goldberg v. Kelly, 397 U.S. 254 (1970) 19

Greene v. Briggs, 10 F. Cas. 1135 (No. 5, 764) (CCDRI 1852) 21

Griffin v. Illinois, 351 U.S. 12 (1956) 21

Hopt v. Utah, 110 U.S. 574 (1884) 12

Illinois v. Allen, 397 U.S. 337, *rehearing denied* 398 U.S. 915 (1970) 13, 14, 16, 22

Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966) 12

Johnson v. Zerbst, 304 U.S. 458 (1938) 23

Lewis v. United States, 146 U.S. 370 (1892) 12

Long v. District Court of Iowa, 385 U.S. 192 (1966) 21

Malloy v. Hogan, 378 U.S. 1 (1934) 16

Mayer v. Chicago, 40 U.S.L.W. 4055 (U.S. Dec. 13, 1971) 21

Miranda v. Arizona, 384 U.S. 436 (1966) 19, 22, 25, 26

Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679 (1923) 15

North Carolina v. Pearce, 394 U.S. 711 (1969) 19

Pate v. Robinson, 383 U.S. 375 (1966) 15

People v. Anderson, 6 Cal. App. 3d 364, 85 Cal. Rptr 669 (1970) 12

Pointer v. Texas, 380 U.S. 400 (1965) 13

Smith v. Bennett, 365 U.S. 708 (1961) 21

Sniadach v. Family Finance Corporation, 395 U.S. 337 (1968) 19

Snyder v. Massachusetts, 291 U.S. 97 16

Stanley v. Illinois, 40 U.S.L.W. 4692 (U.S. Apr. 3, 1972) 19

State v. Davis, Ariz. , P.2d , (Ariz. Supreme Court June 16, 1972) 25

State v. Davis, 105 Ariz. 498, 467 P.2d 743 (1970) 12

State v. Hunt, 12 Ariz. App. 410, 471 P.2d 303 (1970) 11

State v. Tacon, 107 Ariz. 353, 488 P.2d 297 (1971) .. 11, 20, 25

State v. Taylor, 104 Airz. 264, 451 P.2d 312 (1969) 11, 19

Tate v. Short, 401 U.S. 395 (1971) 21

United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968) cert. denied 394 U.S. 908 (1969) 19, 23

United States v. Hayman, 342 U.S. 205 (1952) 13

United States v. McPherson, 421 F.2d 1127 (D.C. Cir. 1969) 14, 19

United States v. Shelton, 6 F.2d 897 (E.D. La. 1925) 15
United States v. Wade, 388 U.S. 218 (1967) 13
Wade v. United States, 441 F.2d 1046 (D.C. Cir. 1971) 14
Washington v. Texas, 388 U.S. 14 (1967) 13
Williams v. Illinois, 399 U.S. 235 (1970) 21
Wilson v. United States, 391 F.2d 460 (D.C. Cir. 1968) 15

United States Statutes:

18 U.S.C. §3182 (1964) 22
18 U.S.C.A. 1073 (Supp. 1971) 22

Miscellaneous:

United States Constitution Article IV 16, 22
United States Constitution Sixth Amendment 12, 13, 17
United States Constitution Fourteenth Amendment 17, 19
Federal Rules of Criminal Procedure Rule 43 16
Arizona Revised Statutes Annotated
§13-1621 (Supp. 1971-72) 15
§§13-1301 to 13-1328 (1956) 22
Arizona Revised Code of 1928 §5028 15
Arizona Rules of Criminal Procedure
Rule 234 . . . . . 11, 15, 17, 20, 22
Rule 250 15
New York Criminal Procedure Law §§570.02 to 570.66 (McKinney 1971) 22
III Holdsworth, *A History of English Law* (5th Ed. 1942) 13
4 W. Blackstone *Commentaries*, 338 14
J. Moore, *Federal Practice* (2d Ed. 1970) 14

Black's Law Dictionary (4th Ed. 1951) 12

Plucknett, *A Concise History of the Common Law* (5th Ed. 1956) 13

D. Murray, *The Power to Expel a Criminal Defendant from His Own Trial; A Comparative View*, 36 *U. Colo. L. Rev.* 171 (1964) 15

Inter-American Draft Convention on Human Rights 4 *J. Int'l Comm'n Jurists* 164 (1962) 15

European Convention on Human Rights, 4 J. Int'l Comm'n Jurists 131 (1962) 15

International Commission of Jurists, The Rule of Law in a Free Society, 10 (1959) 15

Golden, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 *Colum. L. Rev.* 18 (1916) 12, 15

Note, The Supreme Court, 1969 Term, 84 *Harv. L. Rev.* 30 (1970) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6060

ANTHONY LOUIS TACON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPRME COURT
OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Arizona Supreme Court (App. 53-60) is reported at 107 Ariz. 353, 488 P.2d 973 (1971).

JURISDICTION

The order of the Supreme Court of the State of Arizona, entered on September 23, 1971 (App. 51), was made final by the order of the Supreme Court of the State of Arizona, denying petitioner's motion for rehearing (App. 61). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Can a felony defendant be tried completely in absentia?

II. Can a felony defendant be held to have voluntarily waived his right to be present at his trial without a hearing to determine the issue of voluntariness and an express finding by the trial court on that issue?

III. Can a felony defendant be deprived of his right to be present at the trial of his case because he is too impoverished to afford travel expenses to the site of the trial?

IV. Did the State of Arizona establish a knowing and intelligent waiver of petitioner's right to be present at his trial in this case?

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Article IV, Section 2:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony or other Crime, who shall flee from Justice and be found in another State, shall on Demand of the executive Author-

BLEED THROUGH POOR COPY

ity of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 231:

"Proceedings at which presence of defendant required in felony prosecution; exception

A. In a prosecution for a felony, the defendant shall be present:

1. At arraignment.
2. When a plea of guilty is made.
3. At the calling, examination, challenging, impaneling, and swearing of the jury.
4. At all proceedings before the court when the jury is present.
5. When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.
6. At a view by the jury.
7. At the rendition of the verdict.

B. If the defendant is voluntarily absent, the proceedings provided by this Rule, except those in paragraphs 1 and 2 of subsection A, may be had in his absence if the court so orders."

STATEMENT

Petitioner, Anthony Louis Tacon, then a 20 year old (App. 27), married serviceman, without any previous criminal record, who had not completed high school (App. 11), was arrested and charged on February 24, 1969, with the unlawful sale of marijuana, at which time he was in the U.S. Army and stationed at Fort Huachuca,

Arizona (App. 53). At the request of defense counsel, the trial date was continued from April 22, 1969, and trial was not held until almost a year later (App. 30-31; 53). In the interim, petitioner was discharged from the Army in December, 1969 (App. 9). Petitioner called his court-appointed attorney, Mr. James Whitney of Bisbee, Arizona, and told Mr. Whitney of petitioner's discharge from the service, of his intention to return to his home in New York City, and furnished a New York forwarding address (that of his mother-in-law) (App. 32). At that time both the petitioner and his court-appointed attorney believed that petitioner was free to leave the jurisdiction. (App. 10-11; 31-32). Petitioner then returned to New York City (App. 10). Thereafter, the trial court set March 31, 1970, as the date on which trial was to begin.

On March 3, 1970, petitioner's attorney sent petitioner a letter advising him that his trial had been set for March 31st and that it would probably not be postponed under any circumstances, and requesting petitioner to reply as soon as possible and to plan on being back in Arizona at least one week prior to trial so that the case could be properly prepared (App. 4). Petitioner received this letter on March 6th or 7th (App. 12-13). At the time he was without funds to finance a trip to Arizona and felt that it would do little good to call his attorney immediately (App. 14). He hoped to obtain the needed funds in time to get to Arizona for trial. Thereafter, petitioner attempted to obtain the money needed to return to Arizona (App. 12-14; 24-25). Petitioner could have asked for assistance from his mother in Miami, Florida, but he had never told her about his getting into trouble and did not want to do so because of the embarrassment it would cause (App. 12).

Having received no word from petitioner, his attorney sent a second letter on March 18th, in which he indicated that it might be possible to enter a plea of guilty to a reduced charge of possession of marijuana and that the reduced charge might be treated as a misdemeanor App. 4). However, due to a mail strike in New York City, the letter was delayed and petitioner did not receive it until the evening of April 1st, after his trial had ended (App. 26). On March 24th, still not having heard from petitioner, petitioner's attorney sent a telegram, stating that the trial would proceed on March 31st whether petitioner was present or not, and asking that petitioner contact him immediately. However, the telegram was never received by Western Union's New York office and the petitioner never received it (App. 57). Thus, the only correspondence which the petitioner received prior to trial advising him of the trial date was the letter of March 3rd (App. 57).

Finding himself unable to obtain the funds necessary to return to Arizona, petitioner tried unsuccessfully to reach his attorney by telephone the Saturday before trial, March 28th (App. 5; 27-28). On the morning of Monday, March 30th, petitioner did reach his attorney by telephone. Mr. Whitney, the attorney, told petitioner that the court would proceed with the trial whether petitioner was present or not. Petitioner replied that he would attempt to make it, but was short of funds and did not have sufficient money for transportation. Petitioner asked his attorney to explain this to the judge (App. 34; 41).

The next day, March 31, was the date set for trial. The trial judge met with counsel in chambers for a hearing as to petitioner's absence. The judge pointed out that the county had been put to considerable expense in bringing

a witness, along with two federal marshals, from the federal reformatory at El Reno, Oklahoma, where the witness was incarcerated (App. 2). At the conclusion of the hearing the trial court asked petitioner's attorney to check with his office and around the courthouse to see whether petitioner had perhaps arrived (App. 5-6). A few minutes later, petitioner's attorney reported that petitioner was not present and no word had been received from him. The trial court ordered the matter to proceed to trial in the absence of the defendant (App. 6).

At about the time the trial began, petitioner's mother, living in Miami, Florida, had found out about the criminal charge pending against her son from petitioner's mother-in-law (App. 14). Sometime during the first day of trial, petitioner's mother called petitioner's attorney's office and indicated that she had been unable to contact petitioner, but that she would attempt to do so and would call back later that night. She never called back, but early the following morning, an attorney in Miami called petitioner's attorney's office and indicated that the petitioner could be present the next morning, April 2nd (App. 6).

Later that same morning (April 1st, the second day of trial), the court met in chambers with counsel. Petitioner's attorney reported the telephone calls from petitioner's mother and the Miami attorney, and moved for a continuance of one day so that petitioner could be present to testify (App. 6). The court denied the motion, stating that the petitioner had been given more than sufficient time to inform the court of his ability or inability to be present and that under the circumstances petitioner's absence must be considered to be voluntary (App. 7-8). Trial then resumed and was concluded the

same day. No evidence or witnesses were presented for the defense. (Transcript of March 31 and April 1, 1970, at 162). After less than half an hour of deliberations, the jury reached a verdict of guilty. (Transcript of March 31 and April 1, 1970, at 195, 197). The offense in question is a serious one under Arizona law carrying penalties of up to five years to life imprisonment.

Having received money for transportation from his mother (App. 14-15), and although aware from his telephone conversation with his attorney on March 30th, that a bench warrant for his arrest had been issued, so that he faced the certainty of incarceration in jail if he returned (App. 15-16), petitioner returned to Arizona arriving late in the evening of the next day, April 2nd. He contacted his attorney the following morning (App. 16). Together they went to the authorities on April 3rd and petitioner turned himself in, and was promptly jailed.

Ten days later the petitioner was sentenced to not less than 5 nor more than 5½ years in the Arizona State Penitentiary (App. 53). Thereafter on May 4, 1970, a hearing was held in connection with an order by the trial court to show cause why the petitioner should not be punished for contempt by reason of his failure to appear for trial at the time and date set and scheduled. Petitioner's court-appointed attorney and petitioner testified as to the circumstances surrounding his absence. At the conclusion of the hearing, the judge told the petitioner that he was not impressed by the petitioner's expressed intentions, that he could not believe them, and that he did not see any justification or excuse for petitioner's conduct (App. 50). The court then took the matter under advisement (App. 50).

On appeal, in an opinion filed September 23, 1971, the Arizona Supreme Court held that, under Rule 231 of the Arizona Rules of Criminal Procedure, petitioner's absence from his entire trial constituted a knowing and intelligent waiver of his right to be present at the trial, and that the trial court, therefore, did not err in proceeding with the trial in his absence. The court reasoned that where a defendant's knowledge of the trial date is shown, the defendant has the burden of persuading the court that his absence was not voluntary (App. 57). And since the petitioner had this burden, and there was "substantial evidence in the record" supporting the trial court's determination of voluntariness, the Arizona Supreme Court stated that it would "not presume to 'second guess' the trial judge." (App. 58).

On October 27, 1971, the Arizona Supreme Court denied petitioner's motion for rehearing in the case and entered an order affirming the trial court's judgment (App. 61). A motion for leave to proceed in forma pauperis and a petition for writ of certiorari were granted June 12, 1971 (App. 63).

SUMMARY OF ARGUMENTS

I. A felony defendant may not be tried completely in absentia. The right to be present, at least at the commencement of one's trial, must be recognized in order to safeguard against dilution of an accused's Sixth Amendment rights to complete and adequate cross-examination and effective assistance of counsel and his Fourteenth Amendment right to a fair trial. If tried completely in absentia, the accused is unable to assist in his own defense and provide information to counsel

which might otherwise aid the defense. The right to be present at one's trial is recognized, without exception, by international jurists and was so recognized in Anglo-American common law. Art. IV §2 of the Constitution, when read in conjunction with the Sixth and Fourteenth Amendments, can be construed as imposing a duty upon the states to see that a defendant is present for his trial.

II. A felony defendant cannot be held to have voluntarily waived his right to be present at his trial without a hearing to determine the issue of voluntariness and an express finding by the trial court on that issue. Arizona criminal procedure does not provide for a hearing to determine the voluntariness of one's absence from trial. Under this Court's decisions, a hearing is necessary where important rights are subject to forfeiture by a state procedure which by-passes the necessity of a hearing without compelling justification therefor. Since Arizona presumes waiver of the right to be present at trial if a criminal defendant knew of the trial date and does not show up for trial, a hearing is critical in order to rebut this presumption.

III. A felony defendant cannot be deprived of his right to be present at trial because he is too impoverished to afford travel expenses to the site of the trial. The record in this case shows that petitioner was unable to make it to the site of his trial in time to appear therein because of his financial condition. This Court has steadfastly held that a waiver of constitutional rights cannot be predicated on an individual's failure to exercise that right because of his impoverished condition.

POOR COPY

IV. The State of Arizona did not establish a knowing and intelligent waiver of petitioner's right to be present at his trial in this case. In Arizona a criminal defandant has the burden of proving his absence from trial was involuntary once it is shown that he knew of the trial date. This burden is a very difficult one. The Arizona Supreme Court's construction of "waiver" is in conflict with this Court's definition. There was no evidence in this case that petitioner voluntarily waived his right to be present at trial. Indeed, the uncontroverted evidence indicated exactly the opposite, *i.e.*, that petitioner did not voluntarily waive his right to be present at trial.

ARGUMENT

I.

A FELONY DEFENDANT CANNOT BE TRIED COMPLETELY IN ABSENTIA

It is settled law in Arizona under *Arizona Rules of Criminal Procedure*, Rule 231, that a felony defendant may be tried completely in absentia if he "is voluntarily absent." *State v. Tacon*, 107 Ariz. 353, 488 P.2d 297 (1971); *State v. Taylor*, 104 Ariz. 264, 451 P.2d 312 (1969); *State v. Hunt*, 12 Ariz. App. 410, 471 P.2d 303 (1970). The Arizona Supreme Court has conceded that:

> "Perhaps the orderly administration of justice would be better served by requiring the presence of the defendant at the beginning of his trial." *State v. Taylor*, 104 Ariz. 264, 266, 451 P.2d 312, 314 (1969).

But, in fact, in Arizona the defendant need only be present at his arraignment, entering a guilty plea, and

sentencing. *State v. Davis*, 105 Ariz. 498, 467 P.2d 743 (1970); *Arizona Rules of Criminal Procedure*, Rule 231(B).

This Court has held that the trial of a felony charge cannot be commenced in the absence of the accused and that his right to be present at the commencement of trial cannot be waived either by himself or by his counsel. *Lewis v. United States*, 146 U.S. 370 (1892); *Hopt v. Utah*, 110 U.S. 574 (1884). And this Court has observed that in felony cases the right to be present at trial is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 233 U.S. 442, 455 (1912). *See also, Ingram v. Peyton*, 367 F.2d 933, 937 (4th Cir. 1966); *People v. Anderson*, 6 Cal. App. 3d 364, 85 Cal. Rptr. 669 (1970).

Although there is no express language in the Constitution compelling a criminal defendant's presence at trial, this right must, of necessity, be implied in order to safeguard against dilution of his Sixth and Fourteenth Amendment rights.

It is axiomatic that without a criminal defendant's presence at trial, there can be no confrontation of the witnesses against him. Since the word "confrontation" is generally defined to mean "face-to-face" meeting, the drafters of the Sixth Amendment must have presumed a defendant's presence at trial. *See Black's Law Dictionary* 372 (4th Ed. 1951). Indeed, use of the word "confrontation" by the drafters may very well have been in recognition of the common law then-existing, since the right to be present at one's trial was well-recognized by Anglo-American common law at the time the Sixth Amendment was drafted. *See* Golden, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*,

16 *Colum. L. Rev.* 18, 18-21 (1916); see also, III Holdsworth, *A History of English Law* 604-07 (5th Ed. 1942); Plucknett, *A Concise History of the Common Law* 430-31 (5th Ed. 1956).

In *Illinois v. Allen*, 397 U.S. 337, 338, *rehearing denied*, 398 U.S. 915 (1970), the right to be present at every stage of one's trial was labelled "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause." *See also, United States v. Hayman*, 342 U.S. 205 (1952) (in a "criminal trial where the guilt of the defendant is in issue . . . his presence is required by the Sixth Amendment.")

The Sixth Amendment also guarantees to a criminal defendant "the right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel," *United States v. Wade*, 388 U.S. 218, 227 (1967); *see Pointer v. Texas*, 380 U.S. 400, 407 (1965) (cross-examination must be "complete and adequate"), and the right "to have compulsory process for obtaining witnesses in his favor." *Washington v. Texas*, 388 U.S. 14, 18 (1967). When there is a trial of a criminal defendant completely in absentia, each of these rights are jeopardized.

If tried completely in absentia, by definition the defendant is unable to assist in his own defense. Without the accused's presence, there is no opportunity of consultation with counsel during the course of the proceedings. Such consultation may be critical in a given case to supply information to counsel which is known by the accused about a particular witness or about the content of his testimony and of which counsel is not aware. Furthermore, it is inevitable that in many cases counsel will be unable to communicate with the defendant while preparing his defense if the defendant's

whereabouts are unknown. Under such circumstances, witnesses which might otherwise aid in the defense may be unknown to counsel and hence not called to testify and counsel will be forced to speculate on the defenses which should be raised and the scope and points of cross-examination. In short, the effectiveness of counsel may be severely undermined by the defendant's absence and the trial rendered a sham.

One court has noted that where, as here, the defendant is the only defense witness and because of his absence is unable to testify in his own behalf, even the continuation of trial is tantamount to a guilty plea. *Wade v. United States*, 441 F.2d 1046, 1049 (D.C. Cir. 1971); *United States v. McPherson*, 421 F.2d 1127, 1130 (D.C. Cir. 1969). Furthermore, the defendant's absence leads to the natural conclusion that "the defendant has fled because of consciousness of guilt." J. Moore, *Federal Practice* § 43.02 (2d Ed. 1970). Stated otherwise, trial in absentia is a hallmark of tyranny. *See Illinois v. Allen*, 297 U.S. 337, 347-48, *rehearing denied*, 398 U.S. 915 (1970) (Brennan, J., concurring); *Note, The Supreme Court, 1969 Term*, 84 *Harv. L. Rev.* 30, 98 (1970). It makes a mockery of the procedural safeguards aimed at protecting individual liberty and purifying the fact-finding process. It smacks of:

> "the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of providence to save the innocent whenever it was presumptuously required." 4 W. Blackstone, *Commentaries*, 338.

Ironically, the Constitution and the State of Arizona would not permit trial if the defendant, although physically present, were not mentally competent to assist

BLEED THROUGH POOR COPY

in his own defense. *Pate v. Robinson*, 383 U.S. 375 (1966); *Dusky v. United States*, 362 U.S. 402 (1960); *Wilson v. United States*, 391 F.2d 460, 463 (D.C. Cir. 1968); *Arizona Revised Statutes Annotated* §13-1621 (Supp. 1971-72); *Ariz. R. Crim. Pro.* 250. Yet, if the defendant is physically absent, Arizona recognizes no restraint against proceeding to try him.

There would have been no question in the Eighteenth or Nineteenth Centuries but that a trial in absentia for a felony was abhorrent to Anglo-American justice. *See, e.g., United States v. Shelton*, 6 F.2d 897 (E.D. La. 1925); *Noell v. Commonwealth*, 135 Va. 600, 608-09, 115 S.E. 679-81 (1923); Golden, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 *Colum. L. Rev.* 18, 18-20 (1916). Clearly, Arizona would not have permitted such a trial for prior to enactment of what has become *Ariz. R. Crim. Pro.* 231, Arizona followed the rule stated in *Arizona Revised Code of 1928*, §5028:

> "If the prosecution is for a felony, the defendant must be personally present at the trial . . ."

In D. Murray, *The Power to Expel a Criminal Defendant from His Own Trial: A Comparative View*, 36 *U. Colo. L. Rev.* 171, 185-86 (1964), two noteworthy observations are made. First, the International Commission of Jurists have enunciated without exception the rule that an accused has the right to be present at his trial. *International Commission of Jurists, The Rule of Law in a Free Society* 10, 126, 250-52 (1959). Second, this same right may also be discerned in Article 6 of the *Inter-American Draft Convention on Human Rights*, 4 *J. Int'l. Comm'n. Jurists* 164 (1962) and Article 6 of the *European Convention on Human Rights*, 4 *J. Int'l. Comm'n. Jurists* 131 (1962).

In contrast to Rule 231 of the *Arizona Rules of Criminal Procedure*, the rule governing criminal proceedings in federal courts safeguards against the abuses of constitutional rights inherent in a trial completely in absentia. *Fed. R. Crim. Pro.* 43(b) requires, at a minimum, that a defendant charged with a felony be present at the commencement of trial. This requirement assures that the defendant has been afforded the opportunity to consult with counsel and inform him of witnesses and other information potentially helpful to the defense. It also precludes the inference from complete absence that the defendant has fled the jurisdiction. Once this requirement has been met the defendant may, by his disruptive conduct, *Illinois v. Allen*, 397 U.S. 337 *rehearing denied*, 398 U.S. 915 (1970), his express waiver, or voluntary self-removal after trial commences, waive his right to be present as the trial continues. *Diaz v. United States*, 223 U.S. 442 (1912). And he may be absent during some stage of the proceedings where his absence would not influence the court or jury and his personal assistance in his defense is unnecessary. *Snyder v. Massachusetts*, 291 U.S. 97, *overruled on other grounds, Malloy v. Hogan*, 378 U.S. 1 (1934); *Dowdell v. United States*, 221 U.S. 325 (1911).

The Constitution of the United States, Article IV, Section 2, grants to every state the power to demand and obtain return from any other state of persons charged with a crime by the demanding state. Had the Constitution intended this provision to merely guarantee the availability of a defendant for imposition and execution of sentence, the provision could have been much more narrowly drawn and construed. *See Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917); *Appleyard v. Massachusetts*, 203 U.S. 222 (1906). The

POOR COPY

provision applies to any person *charged* with a crime, and not merely to those convicted of a crime or brought to trial for a crime. It is clear that the provision sought to guarantee access to the defendant in order to bring him to trial. *Biddinger v. Commissioner of Police*, 245 U.S. 128, 132-33 (1917).

Concomitant with the extradition power and read as it must be in the context of the right to be present at trial guaranteed by the Due Process Clause of the Fourteenth Amendment and by the Sixth Amendment, is the responsibility of each state to see that a felony defendant is present for the commencement of his trial or to make some effort to procure his presence.

Petitioner respectfully submits that a felony defendant's presence is constitutionally required, at the very minimum, at the commencement of trial and that *Ariz. R. Crim. Pro.* 231 is, therefore unconstitutional.

II.

A FELONY DEFENDANT CANNOT BE HELD TO HAVE VOLUNTARILY WAIVED HIS RIGHT TO BE PRESENT AT HIS TRIAL WITHOUT A HEARING TO DETERMINE THE ISSUE OF VOLUNTARINESS AND AN EXPRESS FINDING BY THE TRIAL COURT ON THAT ISSUE.

Following petitioner's sentencing, a hearing was held by the trial court on May 4, 1970, to determine whether petitioner should be punished for contempt of court by reason of his failure to appear for trial at the time and date set and scheduled. Although some facts regarding the petitioner's absence during his trial were elicited at that hearing, the purpose of the hearing was not to

determine the voluntariness of his absence from trial (indeed he had been sentenced weeks before the hearing) but simply to determine whether he should be held in contempt. Moreover, the trial judge at this hearing never made an express finding as to whether or not petitioner voluntarily absented himself from his trial. Instead, the court took the matters related to its contempt allegation under advisement. (App. 48-50).

The only recorded statement that the trial court had found petitioner's absence from trial "voluntary" was a conclusion to that effect when confronted with a motion to stay termination of trial on April 1, 1970 (App. 7-8). Other than this conclusory statement, the only indication of the trial court's opinion on the matter came at the close of the hearing on the contempt charge on May 4, 1970. After the court stated it would take the contempt charge under advisement (App. 49), petitioner made a statement to the court, which concluded:

> "Of course, the Court has no way of knowing, actually, how I really did feel, but I tell the Court that I had—that I had no intentions of not coming." (App. 50).

The Court replied:

> "I might say this, Mr. Tacon, the Court is impressed not a bit by your expressed intentions in this case. I don't believe any of them, and I just can't see any justification or excuse for your conduct. That's all." (App. 50).

The Arizona Supreme Court, instead of making actual findings or remanding for an evidentiary hearing and findings, relied on the aforementioned parenthetical comments in holding that it would not presume to "second guess" the trial court's conclusion since there was "substantial evidence" to support it. 107 Ariz. at 356-57, 488 P.2d at 976-77 (App. 58).

In order to hold that a defendant has voluntarily waived his right to be present at trial, there must be an evidentiary hearing to determine the issue of voluntariness and an express finding by the trial court on that issue. *Cf. State v. Taylor*, 104 Ariz. 264, 265, 451 P.2d 312, 313 (1969). Where a waiver of important Constitutional rights is involved, such a waiver cannot be presumed from a silent record. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *see United States v. McPherson*, 421 F.2d 1127 (D.C. Cir. 1969); *Cureton v. United States*, 396 F.2d 671, 676 (D.C. Cir. 1968); *Cross v. United States*, 325 F.2d 629, 631-33 (D.C. Cir. 1963); *United States v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968). Express findings of fact not only facilitate appellate review but also help guard against judicial vindictiveness, *North Carolina v. Pearce*, 394 U.S. 711, 726 (1969), thereby encouraging an absentee defendant's voluntary return to the trial jurisdiction.

This Court has steadfastly held that where, as here, important rights are at stake, due process demands a fair hearing resulting in findings of fact and conclusions of law by an impartial magistrate before a state can (without compelling justification for its procedure omitting a hearing) cause forfeiture of those rights. *E.g. Fuentes v. Shevin*, 40 U.S.L.W. 4692 (U.S. June 12, 1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1968).

A hearing is particularly necessary to protect Fourteenth Amendment rights where, as here, an irrational presumption is left unattacked by the procedure which omits a hearing. *See Stanley v. Illinois*, 40 U.S.L.W. 4371 (U.S. April 3, 1972). Under the

Arizona Supreme Court's construction of *Ariz. R. Crim. Pro.* 231(b) once a criminal defendant's knowledge of the trial date is shown, he has the burden of proving his absence from trial was not voluntary. *State v. Tacon*, 107 Ariz. 353, 356, 488 P.2d 973, 976 (1971) (App. 57). In other words, if a defendant knows of his trial date, waiver will be presumed unless he can prove otherwise. Yet there is no procedure in Arizona for an evidentiary hearing to make a record on this issue. In effect, a criminal defendant is without means of proving he has not waived his right to be present at trial.

Petitioner respectfully submits that the procedure followed in this case, which precluded him from having a fair hearing on the issue regarding the voluntariness of his absence from trial before an impartial magistrate resulting in express findings of fact and conclusions, denied him due process of law.

III.

A FELONY DEFENDANT CANNOT BE DEPRIVED OF HIS RIGHT TO BE PRESENT AT THE TRIAL OF HIS CASE BECAUSE HE IS TOO IMPOVERISHED TO AFFORD TRAVEL EXPENSES TO THE SITE OF THE TRIAL.

The record in this case shows that petitioner told his attorney that he intended to appear for his trial but that he did not have sufficient money for transportation. He asked his attorney to explain this to the judge. (App. 14; 34). And, indeed, as soon as funds for travel were made available to him, he made his way to the site of the trial (well over 2000 miles from his home.) (App. 15; 34).

The fact that petitioner was ultimately able to obtain funds for transportation from his mother and the fact that he had not sought assistance from her because he wanted to keep the fact of the pending criminal charges from her (App. 12-13) should not negate his own impoverished circumstances. Petitioner at the time of trial was over 21 years old (App. 27) and had incurred substantial expenses as a result of a recent separation from his wife. (App. 13). There is no rule of law requiring an adult, non-dependent, married individual to solicit funds from relatives outside his own household in order to preserve his right to be present at his own trial, no more than that is required to preserve his right to counsel.

A waiver of constitutional rights cannot be predicated on an individual's failure to exercise that right because of his impoverished circumstances. *Gideon v. Wainwright,* 372 U.S. 335 (1963). This Court has held steadfast in opposing monetary barriers to the poor's access to appellate relief. *E.g., Mayer v. Chicago,* 40 U.S.L.W. 4055 (U.S. Dec. 13, 1971); *Long. v. District Court of Iowa,* 385 U.S. 192 (1966); *Douglas v. California,* 372 U.S. 353 (1963); *Smith v. Bennett,* 365 U.S. 708 (1961); *Griffin v. Illinois,* 351 U.S. 12 (1956). It has refused to permit monetary bars to access to the courts where no remedy outside the judicial system was available. *Boddie v. Connecticut,* 401 U.S. 371 (1971). And, in general, this Court has opposed deprivation of liberty imposed solely because of a defendant's indigency. *Tate v. Short,* 401 U.S. 395 (1971); *Williams v. Illinois,* 399 U.S. 235 (1970). Now the State of Arizona would set a springe for the impecunious to prevent them from obtaining access to their own criminal trial. *See Greene v. Briggs,* 10 F. Cas. 1135 (No. 5, 764) (CCDRI 1852). And this it does

despite the fact that the State of Arizona has, and in this case had, alternatives available to protect its interests in bringing the indigent defendant to trial. U.S. Const. Art. IV, § 2; *Arizona Revised Statutes Annotated*, §§ 13-1301 to 13-1328 (1956); *New York Crim. Proced. Law* §§ 570.02 to 570.66 (McKinney 1971); 18 U.S.C. § 3182 (1964). And in addition to having the assistance of state investigative agencies in its efforts to bring the defendant to trial, the State of Arizona can request the assistance of federal agencies under 18 U.S.C.A. § 1073 (Supp. 1971).

IV.

THE STATE OF ARIZONA DID NOT ESTABLISH A KNOWING AND INTELLIGENT WAIVER OF PETITIONER'S RIGHT TO BE PRESENT AT HIS TRIAL IN THIS CASE.

Under *Ariz. R. Crim. Pro.* 231(b), a felony defendant may be tried in absentia if he is "voluntarily absent." In construing this provision, the Arizona Supreme Court held in this case that:

> "Once a defendant's knowledge of the trial date is shown, the defendant has the burden of persuading the court that his absence was not voluntary." 107 Ariz. at 356, 488 P.2d 976 (App. 57).

By placing on the defendant a burden of showing that he did not waive his right to be present, the Arizona Supreme Court departed from the long line of decisions in which this Court has held that every reasonable presumption must be indulged against the waiver of a Constitutional right. *E.g., Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Boykin v. Alabama*, 394 U.S. 238 (1969); *Miranda v. Arizona*, 384 U.S. 436, 475-77 (1966);

Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). *See United States v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) (right to be present at a critical stage of trial is so basic that it cannot be treated as harmless error).

The burden of proving one's absence from trial was not voluntary is an onerous one indeed. The issue is necessarily subjective; the means of arguing one's own state of mind are limited. Frequently, the sole means of proving that one did not voluntarily waive his right to be present at trial will be his own declarations to the contrary. Under such circumstances, a defendant's chances of proving his involuntary absence are slight, since his credibility has already been purged by failing to show up for trial.

The difficulty inherent in this burden of proof is well-illustrated by the instant case. At the contempt hearing of May 4, 1971, petitioner explained his absence, which concluded:

> "Of course, the court has no way of knowing, actually, how I really did feel, but I tell the court that I had—that I had no intentions of not coming." (App. 50).

The Court replied:

> "I might say this, Mr. Tacon, the court is impressed not a bit by your expressed intentions in this case. I don't believe any of them and I just can't see any justification or excuse for your conduct. That's all." (App. 50).

When constitutional rights are involved, "waiver" is defined as "the intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1968). The Arizona Supreme Court's own statement of

the facts should have made it clear that there was no intentional relinquishment of petitioner's right to be present in this case:

> "From the above, it is apparent that Tacon received only one item of correspondence informing him of the trial date—the letter sent by his attorney on March 3rd. However, he testified that from that letter he understood that the trial was set for March 31st, and that the trial would proceed without him if he failed to appear. He stated that at the time he received the letter from his attorney he was without funds and had no means of financing a trip to Arizona for the trial. Under these circumstances, he felt that it would do little good to call his attorney since he would not be able to make it to the trial anyway. He said he could have asked for assistance from his family in Miami, but that he had never told them about his getting in trouble and did not want to do so because of the embarrassment it would cause them. His mother had learned of his situation only because a third party had informed her of it. Tacon concluded his testimony by stating that it was his intention to get to the trial but that he just could not get the money together soon enough." 107 Ariz. at 356, 488 P.2d at 976 (App. 57).

There is no evidence in the court's opinion or in the record in this case that petitioner did intend to relinquish his right to be present at his trial. The Arizona Supreme Court can only mean that once it is shown that a defendant knew of his trial date, merely showing that he was not present at his trial is sufficient to establish waiver of his right to be present. This conclusion is just as constitutionally offensive as would be presuming a valid waiver of the rights to silence and an attorney in an in-custody interrogation "simply from the silence of the

accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda v. Arizona,* 384 U.S. 436, 475 (1966).

Although there was some evidence in the Arizona Supreme Court's opinion in this case that the Court had also relied on the fact that petitioner knew that the trial would proceed in his absence, the Arizona Supreme Court has subsequently made it clear that this fact did not support its opinion. In *State v. Davis,*____Ariz.____, ____P.2d____(Ariz. Supreme Court, June 16, 1972), the Arizona Supreme Court explained:

> "Defendant argues . . . (b) that there is no proof that he knew that the trial could proceed in his absence.
>
> * * * * *
>
> With reference to (b) the following language [from *State v. Tacon*] lends some support to defendant's position: 'In order for a defendant to make a knowing and intelligent waiver of his right to be present at the trial, he must be aware that the trial will proceed without him if he fails to appear.'
>
> This was pure dictum and upon closer analysis the error in that statement is apparent. It is true that a waiver is a voluntary relinquishment of a known right and without knowledge of a right, there can be no waiver. But the right to try a defendant in absentia rests upon his waiver *of his known right to be present, not upon the (possibly unknown) court's right to try him while absent.* Here the defendant knew that he had a right to be present and has failed to show that he did not voluntarily elect to waive that right." (Emphasis original.)____Ariz.__, __, ____ P.2d____.

The Arizona Supreme Court's construction of "waiver" is untenable and totally at odds with this Court's construction. If a waiver must be "intelligently and understandingly" made, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), it cannot be seriously maintained that waiver does not demand a knowledge of the consequences of one's conduct. If the Arizona Supreme Court's construction of "waiver" is correct, the mandate in *Miranda v. Arizona, supra*, that an accused be warned that his statements can be used against him in a court of law must have been superfluous dictum.

Arizona provides for no procedure for a hearing whereby an absent defendant may explain the involuntariness of his absence. At an informal in camera hearing before trial, counsel for petitioner explained that he had been in contact with petitioner; that petitioner stated he would attempt to make it to trial; and that at the time of his conversation petitioner was without sufficient money for transportation (App. 5). The trial judge, noting that notice had been sent to petitioner of his trial date and that the State of Arizona had incurred expenses in obtaining the presence of its witnesses, decided to proceed with the trial. (App. 2-5). During the second day of trial, counsel for petitioner requested, by oral motion, to stay termination of trial on the grounds that petitioner's Florida attorney had contacted him and stated that petitioner could be present the following day to testify. (App. 6-7). The court denied the motion. (App. 7-8).

It was circumstantial that in this case petitioner was afforded, after trial, an opportunity to have recorded his explanation of his absence. No procedure for a post-trial hearing on such matters is provided for by Arizona law. Petitioner's explanatory testimony was recorded at a

hearing on contempt charges arising out of his absence at trial. There petitioner explained that he was in New York City at the time he received notice of the trial date; that he was without funds for transportation to Arizona at the time he received the notice; that he attempted to obtain the funds; that when he knew he would not be able to raise enough money in time he contacted his Arizona attorney and asked that he explain this to the judge and that he would continue to try and raise the money; and that as soon as he did raise the money, he immediately proceeded by plane to Arizona, arriving the day after his trial had ended. (App. 12-15). This testimony was uncontroverted. It was corroborated by his court–appointed trial attorney. (App. 34-36).

Although at this hearing the court noted that it felt that petitioner's conduct was without "justification or excuse" (App. 50), no findings were made on the issue of whether petitioner was voluntarily absent from trial. At this point, petitioner had already been sentenced and implicitly the trial judge had deemed the matter already closed by its earlier conclusions. (App. 8). On appeal, the Arizona Supreme Court, rather than making actual findings or remanding for an evidentiary hearing and findings, simply stated that it would not "second guess" the trial judge's opinion on the matter since there was "substantial evidence in the record to support it." 107 Ariz. at 356-57, 488 P.2d at 976-77 (App. 58).

Some attention must be paid to petitioner's ability and inclination to appear for trial. In this case, as soon as petitioner obtained the funds necessary to finance a trip to Arizona, he did, in fact, fly to Arizona, unfortunately arriving the day after the trial had concluded. Yet, because of the procedure followed in this case, this fact (which is perhaps the best evidence of petitioner's

intention not to waive his right to be present at trial) as well as the explanatory testimony given by petitioner at the contempt hearing of May 4, 1972, were not before the Court at the time it had apparently decided petitioner's absence was voluntary (App. 8).

Petitioner respectfully submits that he did not voluntarily waive his right to be present at trial and that the Arizona Supreme Court's conclusion to the contrary was erroneous.

CONCLUSION

For the foregoing reasons, petitioner requests that this court rule that a felony defendant may not be tried completely in absentia without an express waiver of his right to be present at trial. Alternatively, petitioner requests that this Court rule that a felony defendant's conviction, decided at a trial conducted in his absence, be left to stand only after a voluntary waiver of his right to be present has been determined at a post-trial hearing with the defendant present, resulting in findings of fact and conclusions of law by an impartial magistrate.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

ROBERT J. HIRSH

509 Transamerica Building
Tucson, Arizona 85701

Counsel for Petitioner

POOR COPY